

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

KAYAK MANUFACTURING CORP.

Case No. 90-12981 K

Debtor

MARK S. WALLACH, Trustee

Plaintiff

-vs-

AP 92-1102 K

MAJESTIC POOLS & EQUIPMENT CO., INC.
BEAUTY POOLS, INC.,
GERALD B. COHEN, Individually and
d/b/a PARAMOUNT ENTERPRISES,
CORTZ, INCORPORATED, and
ROBERT DOUGLAS KROTZER, a/k/a
R. DOUGLAS KROTZER

Defendants

BEAUTY POOLS, INC. and
MAJESTIC POOLS & EQUIPMENT CO., INC.

Third-Party Plaintiff

-vs-

AMERICAN TELEPHONE & TELEGRAPH,
RICHARD GERSPACH, d/b/a ISLAND POOLS,
MONTE QUICK, d/b/a KAYAK POOLS OF
INDIANA, JORNIC ENTERPRISES, INC.
d/b/a JORY POOLS, and UNITED SERVICES
CORPORATION a/k/a JOHNNY'S POOLS &
SPAS

Third-Party Defendants

*ORDER SETTING TRIAL DATE,
AND DECIDING PENDING MOTIONS*

First, In light of the liberality with which amendments
are granted under the Federal Rules so long as notice to

opponents is adequate, the Trustee's Motion to Amend the Fourth Cause of Action, contained in his "Cross Motion and Answering Affidavit" filed April 26, 1996 is granted. But no further discovery will be granted to him, and if going forward to trial on the amended cause with the discovery that has been completed would be patently frivolous, then the Trustee shall voluntarily discontinue that amended cause of action.

If the Defendants need further discovery as to the amended cause, they shall have it on request.

Second, the responses to AT & T's Motion for Summary Judgment are procedurally problematic. The Trustee opposed the Motion in a timely fashion, but it is not clear that he has asserted any claims directly against AT & T (which is a third party defendant), and thus it is not clear that he has standing to oppose AT & T's motion.

Beauty Pools' opposition is late. Similarly, Majestic Pools' response is late, but claims to rest on earlier submissions.

Even in the absence of opposition, however, it is not clear that the Motion should be sustained. Its premise that the 800 number was not property of the estate was rendered academic by the Court's decision of May 10, 1996 to the effect that the Debtor had a protectable property interest in the 800 number.

Its alternative premise that AT & T's actions were "analogous to those of a Court Clerk recording a deed, a motor vehicle office processing a transfer of title, or a common carrier transporting property at the debtor's request" is inconsistent with the evidence AT & T itself offers -- a Transfer of Service Agreement and Notification which on its face identifies Kayak as a "D.I.P." and assures AT & T of satisfaction of Kayak's unpaid obligations to AT & T relative to the account. AT & T was not acting in a ministerial capacity, and it defies common sense to believe that AT & T does not make some inquiry into the authority of a transferring officer to transfer such numbers. Transferring "ownership" of a well-advertised 800 number is not like carrying goods in transit. While 1-800-52ORDER might not rise to the value of a number like 1-800-FLOWERS, for example, the damages that could be caused to the rightful owners of those two numbers by a false or fraudulent "Transfer of Service Agreement and Notification" are only quantitatively, not qualitatively, different.

Thus, even in the absence of opposition, it does not appear at this time (prior to trial) that summary judgment is "appropriate," as that word is used in Rule 56(e).

Nonetheless, AT & T's Motion will remain under submission until the conclusion of the proceedings scheduled for

July 29, 1996, as discussed below.

Third, Beauty Pools' Motion for Summary Judgment is denied. The Affidavit of John P. Bunch of May 30, 1996, among other evidence of record, establishes a triable issue as to: (1) the nature of scope of the relationship between Majestic and Beauty; and (2) the extent of Beauty Pools' knowledge of participation in and benefits derived from the activities of Majestic, and perhaps other relevant matters. Because of the former point, the Court cannot seriously entertain Beauty's suggestion that things like obtaining the "800 number" to facilitate the sale of inventory that they may have acquired jointly for sale, are outside the scope of the relationship, as a matter of law. Similarly, Beauty's assertion that it cannot be held "vicariously liable for the wilful and malicious wrongful conduct of another [under] fundamental principals of partnership law" is too blithe. Mr. Bunch's affidavit is provocative, particularly as to the sharing of premises by "New Kayak Pool Corp." and Beauty Pools, if that is true. But even if that is not true, Mr. Bunch's representation that all actions of Majestic were in the "ordinary course of and in furtherance of" the Majestic/Beauty relationship, is worthy of trial.

All of the remaining causes shall be tried. Because not all parties have elected to appear and be heard as to all

proceedings in this complex proceeding, it is the Court's desire to lay as many causes to rest as to as many parties as possible, prior to trial and that trial be severed as to parties where appropriate.

It is also desired by the Court that the remaining theories and the potential liabilities of the various parties be clearly articulated prior to final pretrial.

Toward that end, this litigation is set **FOR TRIAL** on July 29, 1996 at 9:00 a.m., at which time there will be further continuances of trial date based on the equities, and suitable final pretrial orders will be issued as to each cause and each party. A half-day has been set aside for this purpose. NO WITNESSES NEED BE PRESENT.

Judgment for failure to prosecute or failure to defend will be rendered as to each party that fails to appear through counsel at that date and time.

Each appearing party's counsel shall be invested by her or his client with, or shall be accompanied by someone with, authority to settle all aspects of this litigation as to that party. Failure to comply with this provision will result in sanctions, including an adverse judgment, if appropriate.

Trial of all remaining issues will be set for November or December, 1996 (the "off-season" for pool companies in

Buffalo) and there will be no adjournments.

SO ORDERED.

Dated: Buffalo, New York
June 24, 1996

/s/Michael J. Kaplan

U.S.B.J.

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